STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVA BAKER,

Defendant-Appellant.

UNPUBLISHED
November 13, 2008

No. 279828
Ingham Circuit Court
LC No. 06-001268-FH

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of resisting or obstructing a police officer, MCL 750.81d(1), and sentenced to serve sixth months' probation. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Police officers appeared at a residence in response to a complaint of domestic violence and learned that the alleged perpetrator was at a house down the street. The police continued to the other residence, where they found their suspect and informed him he was under arrest. Present with the suspect was his mother, defendant, who repeatedly protested that the police could not arrest him, was warned to back off or face arrest herself on charges of interfering with the police, and then placed herself between the arresting officer and her son.

Defendant argues that the statute under which she was convicted should be interpreted to comport with a person's First Amendment expressive rights, and that doing so in this instance requires reversal. We discern no First Amendment problem in this case.

Statutory interpretation is a question of law calling for review de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). The purpose of statutory interpretation is to give effect to the intent of the Legislature. *Id.* at 699. Constitutional issues are also reviewed de novo by this Court. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

MCL 750.81d(1) sets forth penalties for an individual who "assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties . . . ." MCL 750.81d(7)(a) defines the term "obstruct" as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." This statutory definition of "obstruct" appears, in part, to have been based on our Supreme Court's decision in *People v Vasquez*, 465 Mich 83, 100; 631 NW2d

711 (2001), wherein the Court, construing a comparable criminal statute, MCL 750.479, ruled that the word "obstruct" proscribed "threatened, either expressly or impliedly, physical interference and actual physical interference with a police officer." See 2002 PA 266 (amending MCL 750.81d) and 2002 PA 270 (amending MCL 750.479 to add definition of "obstruct").

Defendant places great reliance on *City of Houston v Hill*, 482 US 451; 107 S Ct 2502; 96 L Ed 2d 398 (1987), in support of her constitutional claim. In *Hill*, the Court addressed the constitutionality of a city ordinance that made it illegal to oppose, molest, abuse, or interrupt a police officer in the execution of his or her duty. The Court held that the ordinance was unconstitutionally overbroad under the First Amendment. *Id.* at 466-467. The *Hill* Court stated that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-463. The Court noted that speech is often provocative and challenging, but it is protected against criminal punishment unless the speech constitutes fighting words that would tend to incite an immediate breach of the peace or the speech would likely produce a clear and present danger that rises above mere inconvenience or annoyance. *Id.* at 461-462.

Here, factually speaking, the evidence showed that defendant offered greater resistance than mere verbal expressions of disagreement with the officer's decision. The police officer mainly involved in the confrontation with defendant testified that defendant repeatedly insisted that her son was not going to jail, and did so with an agitated demeanor. The emphatic and affirmative declaration that the suspect was not going to jail expressed more than mere disagreement, but implied that something would prevent that from taking place. The officer further testified that he repeatedly told defendant to step aside, the last time with raised voice and the warning that her failure to comply would result in her arrest. The officer continued that he then began to move toward the suspect to arrest him when defendant stepped directly in front of him, put her hands out toward him, and again insisted that her son was not going to jail. This testimony brings to light the promise, then the delivery, of actual physical resistance and interference. This is especially so in light of defendant having disobeyed repeated commands to step aside. Defendant's words and actions plainly go beyond expressions protected by the First Amendment.

With respect to the statute itself, the definition provided in MCL 750.81d that references "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command," which the jury here was instructed on, adequately protects against infringement of a defendant's First Amendment rights.

Defendant urges that this Court interpret MCL 750.81d as requiring actionable resistance to a police officer, taking the form of actual or implied force, and argues that because defendant was elderly and frail, her minimal physical resistance did not rise to that level. However, because the statute includes the words "resists, obstructs, [or] opposes" along with "assaults, batters, wounds, . . . or endangers," it is apparent that it was intended to cover interference that does not rise to the level of assaultive or endangering activity along with interference that does rise to that level. Accordingly, we decline defendant's invitation to read the words "resists, obstructs, [or] opposes" out of the statute.

Defendant additionally urges this Court to decree that an officer issuing an order that must be obeyed, as opposed to a mere request delivered in a possibly authoritarian tone, must do

so clearly and unambiguously to distinguish it from a mere request. This case, however, does not call for such a distinction. A police officer having indicated the intention to arrest a suspect, who repeatedly tells a third person offering interference to step aside, including such a command in raised voice, is obviously issuing a command, not making a mere request.

For these reasons, defendant's arguments predicated on her First Amendment expressive rights must fail.[1]

Defendant additionally argues that the trial court erred in allowing amendment of the information at the close of proofs and in crafting its related jury instructions to reflect that amendment. We disagree.

A trial court's decision to allow the prosecution to amend the information is reviewed for an abuse of discretion. *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998). A trial court may permit the prosecution to amend the information before, during, or even after trial, unless the proposed amendment would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *People v Jones*, 252 Mich App 1, 4-5; 650 NW2d 717 (2002).

"Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Conversely, an instruction should not be given that is without evidentiary support. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

At the close of proofs, over objection, the trial court allowed the prosecution to amend the information to eliminate any accusation of assault, battery, or endangerment. The trial court accordingly instructed the jury that proof of the elements required the finding that defendant "resisted, obstructed or opposed" the police, that "obstruct includes the use of a threat to use physical interference or force or knowing failure to comply with a lawful command," and that defendant "actually resisted by what she said or did, but physical violence is not necessary."

Defendant argues that elimination of the assault, battery, wounding, and endangerment aspects of the charge and instructions left the jury with "the false impression that the defendant could violate the charged offense through words and inaction alone." However, as discussed above, words can suffice if they threaten the use of physical interference or force, which was implied when defendant informed police that her son was not going to jail. Words, as well as words and actual physical intervention or resistance, can suffice in establishing the crime, regardless of whether the conduct reaches the level of assault, battery, or endangerment. Indeed, inaction alone can suffice such as where a police officer directs or commands a person to step aside to allow an arrest or investigation of a crime and the person refuses to move. Moreover,

[1] Defendant alternatively urges this Court to announce that its decision in this case should have prospective effect only. Because this case calls for no new development in the interpretation or operation of MCL 750.81d, there is no reason for us to consider decreeing that any rule of law relied upon in rendering our decision is to be limited to prospective application.

again, the evidence brought to light more than just words and inaction on defendant's part, in particular defendant's act of interposing her person between the police officer and defendant's son as the officer was proceeding to arrest the latter.

As noted above, MCL 750.81d sets forth penalties where an individual "assaults, batters, wounds, resists, obstructs, opposes, or endangers" a police officer. Defendant seems to suggest that a conviction requires conduct fitting the definitions of all seven of those verbs. When construing a statute, a court should presume that every word has some meaning. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Accordingly, those seven verbs are better read as overlapping alternatives, such that the conduct described by any one of them may establish an element of the crime.

Because the amendment of the information, and resulting change in jury instructions, to eliminate references to assault, battery, wounds, or endangerment caused both the information and the instructions more accurately to reflect the evidence, the trial court did not err in taking those actions.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski